Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b), confers jurisdiction on the Federal Energy Regulatory Commission ("FERC") to regulate the transportation of natural gas in interstate commerce. It exempts from FERC jurisdiction the "production or gathering of natural gas." This Court has held that "production and gathering are * * * narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90 (1963).

The question presented is whether the FERC's new "central point of aggregation" jurisdictional test, which makes no attempt to define the end-point of gathering on major pipelines in the Gulf of Mexico at or near the point where gas is prepared for the first stages of distribution, and has removed substantial portions of offshore pipelines from the FERC's NGA jurisdiction, is contrary to this Court's interpretation of NGA § 1(b) in *Northern Natural*.

LIST OF PARTIES

The following parties participated in the appeals of the orders of the Federal Energy Regulatory Commission before the United States Court of Appeals for the District of Columbia Circuit:

Amerada Hess Corporation
Amoco Energy Trading Corporation
Amoco Production Company
Anadarko Petroleum Corporation
Baltimore Gas and Electric Company
Boston Gas Company
BP America Production Company
Brooklyn Union Gas Company
Burlington Resources Oil & Gas Company, L.P.
Chevron U.S.A., Inc.
Colonial Gas Company
Delmarva Power & Light Company
Devon Energy Corporation
Dominion Exploration & Production, Inc.
Dynegy Marketing and Trade
Energy North Natural Gas, Inc.
Essex Gas Company
Exxon Mobil Corporation
ExxonMobil Gas Marketing Company
Federal Energy Regulatory Commission
Forest Oil Corporation
Houston Exploration Company
KeySpan Gas East Corporation
Municipal Gas Authority of Georgia
National Fuel Gas Distribution Corporation
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
Producer Coalition
Shell Offshore, Inc.

Sunoco, Inc. (R&M)
Texaco Exploration and Production, Inc.
Texaco Natural Gas, Inc.
TOTAL E&P USA, Inc.
Transcontinental Gas Pipe Line Corporation
Williams Gas Processing—Gulf Coast Company, L.P.

The following additional parties participated in the administrative proceeding before the Federal Energy Regulatory Commission:

AGL Resources, Inc.
Alabama Gas Corporation
Atlanta Gas Light Company
BP Energy Company
Cabot Oil & Gas Corporation
Calpine Energy Services, L.P.
Carolina Power & Light Company
Cherokee County Cogeneration Partners LP
Clinton Newberry Natural Gas Authority
CoEnergy Trading Company
Columbia Gas of Virginia
Columbia Gulf Transmission Corporation
Coral Energy Resources, L.P.
Conoco Gas and Power Marketing
Conoco Inc.
Consolidated Edison Company of New York, Inc.
Danville, City of
Delmarva Power & Light Company
Destin Pipeline Company, L.L.C.
Dominion Transmission, Inc.
Duke Energy
Duke Energy Field Services, Inc.
Duke Energy Trading & Marketing, LLC
Dynegy, Inc.
East Tennessee Natural Gas Company
El Paso Corporation

EnCana Energy Services, Inc.
Enron North America Corporation
Enterprise Oil Gulf of Mexico Inc.
Florida Gas Transmission Company
Fort Hill Natural Gas Authority
Fountain Inn, City of
FPL Energy, L.L.C.
Gulf South Pipeline Company, LP
Independent Petroleum Association of America
Iroquois Gas Transmission System, L.P.
Johns Hopkins University
Johns Hopkins University Health Systems
Kanawha County Commission
Kerr-McGee Oil & Gas Corporation
KeySpan Delivery Companies
KeySpan Energy
Mirant Americas Energy Marketing, L.P.
Motiva Enterprises LLC
New Jersey Energy Associates
New Jersey Natural Gas Company
Niagara Mohawk Power Corporation
North Carolina Natural Gas Corporation
North Carolina Utilities Commission
Northeast Energy Associates
NUI Corporation
NUI Utilities, Inc.
PanEnergy Dauphin Island, LLC
PECO Energy Company
Pennsylvania Office of Consumer Advocate
PG Energy Inc.
Philadelphia Gas Works
Phillips Petroleum Company
Piedmont Natural Gas Company
PLC II, LLC
Process Gas Consumers Group
Public Service Commission State of New York

Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Company
Richmond, City of
Rochester Gas & Electric Corporation
SCANA Services, Inc.
Shell Energy Services Company, L.L.C.
Shell Oil Company
Smurfit-Stone Container Corporation
South Carolina Pipeline Company
South Jersey Gas Company
Southern Company Services, Inc.
Southern Natural Gas Company
Superior Natural Gas Corporation
Tennessee Gas Pipeline Company
Texaco Group, Inc.
Texas Eastern Transmission Corporation
Transco Municipal Group
UGI Utilities, Inc.
United Cities Gas Company
University of Maryland - College Park
US Gypsum Co.
Virginia Natural Gas Company
Virginia Power Energy Marketing, Inc.
Walter Oil & Gas Corporation
Washington Gas Light Company

RULE 29.6 LISTING

The companies listed below, members of the Producer Coalition, are engaged in the exploration and production of oil and natural gas on the Outer Continental Shelf in the Gulf of Mexico ("OCS") and are shippers and marketers of gas on OCS pipelines, including the systems owned by Transcontinental Gas Pipe Line Corporation.

Devon Energy Corporation is a publicly traded company listed on the American Stock Exchange.

Dominion Exploration & Production, Inc. is a wholly-owned, indirect subsidiary of Dominion Resources, Inc., a publicly traded company listed on the New York Stock Exchange.

Forest Oil Corporation is a publicly traded company listed on the New York Stock Exchange.

The Houston Exploration Company is a publicly traded company listed on the New York Stock Exchange. KeySpan Energy Corporation, also a publicly traded company listed on the New York Stock Exchange, owns in excess of 10% of the shares of Houston Exploration.

Newfield Exploration Company is a publicly traded company listed on the New York Stock Exchange.

TOTAL E&P USA, Inc., formerly known as TotalFinaElf E&P USA Inc., is a wholly-owned, indirect subsidiary of TotalFinaElf S.A., which is a French *societe anonyme* whose American Depository Receipts are traded on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Court of Appeals is reported as *Williams Gas Processing–Gulf Coast Co. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) (App. 1a-19a). The orders of the Federal Energy Regulatory Commission ("FERC") affirmed by the Court of Appeals, are reported at 96 FERC ¶ 61,115, *order on reh'g*, 97 FERC ¶ 61,296 (2001); 96 FERC ¶ 61,118, *order on reh'g*, 97 FERC ¶ 61,300 (2001); and 96 FERC ¶ 61,246, *order on reh'g*, 97 FERC ¶ 61,298 (2001).

JURISDICTION

The Court of Appeals had jurisdiction under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). The judgment of the Court of Appeals was entered on June 20, 2003.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides:

> (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption, for domestic, commercial, industrial or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT OF THE CASE

This is a follow-along petition[1] to the pending petitions in *Producer Coalition v. FERC*, No. 02-1215, and *ExxonMobil Gas Mktg. Co. v. FERC*, No. 02-1265, both seeking review of *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) ("*ExxonMobil*"). The issue in *ExxonMobil* and in this case is whether the FERC's central point of aggregation test for determining the jurisdictional status of pipeline facilities on the Outer Continental Shelf ("OCS") in the Gulf of Mexico is consistent with Section 1(b) of the Natural Gas Act ("NGA"). This Court in *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90 (1963) ("*Northern Natural*") and its progeny[2] has ruled that non-jurisdictional

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[1] The Petitioner, the Producer Coalition, is an *ad hoc* group of independent oil and gas producers that have substantial investment in exploration and production projects on the Outer Continental Shelf in the Gulf of Mexico and ship gas on numerous OCS pipelines. Its members include Devon Energy Corporation, Dominion Exploration & Production, Inc., Forest Oil Corporation, The Houston Exploration Company, Newfield Exploration Company, and TOTAL E&P USA, Inc.

[2] *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 513-14 (1989); *Transcontinental Gas Pipeline Corp. v. State Oil &*

gathering under Section 1(b) is "narrowly confined to the physical acts of * * * preparing [the gas] for the first stages of distribution."

A. Background: The FERC's "Central Point of Aggregation Test" in *Sea Robin*

In response to a remand in *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997), the FERC announced its new test for determining the jurisdictional status of major pipeline facilities located on the OCS in the Gulf of Mexico. *Sea Robin Pipeline Co.*, 87 FERC ¶ 61,384 (1999), *reh'g denied,* 92 FERC ¶ 61,072 (2000) ("*Sea Robin*"). Under the "central point of aggregation" test, the dividing line between non-jurisdictional gathering and jurisdictional transportation facilities is generally found at the last major fork in the pipeline before it goes onshore.

The *Sea Robin* orders were affirmed by a divided panel of the Court of Appeals, whose judgment is the subject of the pending petitions in Nos. 02-1215 and 02-1265. The central point of aggregation test has become the rule of decision for FERC's determination of jurisdictional status of OCS pipelines and provides the rationale for the FERC's orders in this case.

B. The Transco Spindown Applications

Relying on the *Sea Robin* orders, in late 2000 and early 2001 Transcontinental Gas Pipe Line Corporation ("Transco") and its affiliate, Williams Gas Processing–Gulf Coast Co. ("Williams"), filed three sets of petitions with the FERC under Section 7(b) of the NGA seeking approval to transfer major portions of Transco's offshore natural gas

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Gas Bd., 474 U.S. 409, 422-23 (1986). *See also Interstate Natural Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 690-91 (1947) ("Exceptions to the primary grant of jurisdiction in [NGA § 1(b)] are to be strictly construed.").

pipeline facilities to Williams, and asking FERC to reclassify the systems, which had previously been certificated as jurisdictional transportation facilities, as exempt gathering facilities. App. at 6a. The petitions covered five different Transco systems constituting hundreds of miles of OCS pipeline.[3]

Applying its central point of aggregation test, the FERC granted the petitions in large measure.[4] App. at 6a. The result was the withdrawal of NGA jurisdiction over more than 600 miles of offshore pipeline, leaving producers captive to Transco's unregulated gathering affiliate.[5]

Each of the FERC's selected jurisdictional demarcation points, like the Vermilion Block 149 platform on Sea Robin, represents the last major fork in the OCS pipeline before it goes ashore. In all cases, the point of demarcation is downstream (in some cases, many miles downstream) of the platforms where the gas is treated and prepared for shipment on Transco's facilities.

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[3] The first petition covered Transco's North Padre Island ("NPI") and Central Texas ("CT") systems; the second covered Transco's North High Island ("NHI") and West Cameron ("WC") systems; and the third covered Transco's Central Louisiana ("CL") system.

[4] *Transco (NPI/CT)*, 96 FERC ¶ 61,115 at 61,429, *order on reh'g*, 97 FERC ¶ 61,296 (2001); *Transco (NHI/WC)*, 96 FERC ¶ 61,118 at 61,449, *order on reh'g*, 97 FERC ¶ 61,300 (2001); *Transco (CL)*, 96 FERC ¶ 61,246 at 61,966, *order on reh'g*, 97 FERC ¶ 61,298 (2001). The FERC found no central point of aggregation on the WC system (approximately 43 miles of pipeline), and therefore concluded that that system served a transportation function. *See Transco (NHI/WC)*, 96 FERC at 61,459-60.

[5] Over 270 pipeline miles were lost from the CT system; 22 from the NPI system; over 111 from the NHI system; and over 300 from the CL system. *Transco (NPI/CT)*, 96 FERC at 61,431; *Transco (NHI/WC)*, 96 FERC at 61,458; *Transco (CL)*, 96 FERC at 61,976-77.

Viewing any argument about its central point of aggregation test as a collateral attack on its *Sea Robin* orders,[6] the FERC made no effort to reconcile its jurisdictional dividing lines with *Northern Natural*'s construction of NGA § 1(b) that gathering is "narrowly confined to the physical acts of * * * preparing [the gas] for the first stages of distribution."

C. The Decision of the Court of Appeals

Relying on its earlier decision in *ExxonMobil*, the Court of Appeals reaffirmed the FERC's application of its central point of aggregation test (App. at 15a-16a) and reiterated that it would uphold any future FERC determinations in this regard unless "patently unreasonable." App at 19a. The court did not address Petitioner's claims that the FERC's test is contrary to this Court's interpretation of NGA § 1(b) in *Northern Natural.*

REASONS FOR GRANTING THE WRIT

By reaffirming *ExxonMobil* and upholding the orders below, the Court of Appeals has again departed from this Court's instruction in *Northern Natural* that non-jurisdictional gathering is "narrowly confined to the physical acts of * * * preparing [the gas] for the first stages of distribution." The decision below ratifies the FERC's abdication of its congressionally mandated duties and licenses the further dismantling of a regulatory scheme that for decades has governed the OCS and protected shippers from pipelines' exercise of market power.

Moreover, the case at bar removes any argument that may have existed over the suitability for review of the FERC's new jurisdictional test. Respondents in *ExxonMobil* argued

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[6] *Transco (NPI/CT), order on reh'g*, 97 FERC at 62,384; *Transco (NHI/WC), order on reh'g*, 97 FERC at 62,411; *Transco (CL), order on reh'g*, 97 FERC at 62,398.

that review would be premature because Sea Robin's continued ownership of the reclassified gathering facilities meant that the FERC retained the power to exercise "in connection with" NGA rate authority over those facilities. Here however, where the reclassified gathering facilities have been spun down to a non-jurisdictional affiliate, the FERC has ceded its NGA jurisdiction entirely. Sea Robin itself possesses precisely the same ability to spin down, at any time, its own gathering facilities, and thereby avoid coverage under the "in connection with" rate protection afforded by the NGA.

I. THE FERC'S NEW JURISDICTIONAL TEST CONFLICTS WITH THIS COURT'S INTERPRETATION OF NGA § 1(b).

The petitions in Nos. 02-1215 and 02-1265, to which we respectfully refer the Court, describe in detail why the decision below cannot be squared with this Court's interpretation of NGA § 1(b) in *Northern Natural*, which the Court of Appeals does not even cite. In the Court of Appeals' view, *ExxonMobil*'s construction of NGA § 1(b) supersedes *Northern Natural*'s.

We note in addition that, as was true for Vermilion Block 149 on the Sea Robin system, no real physical preparation of the gas for the first stages of distribution takes place at any of the FERC's chosen demarcation points along the Transco pipelines. The only relevant physical preparation of the gas in these cases occurs at the production platforms, downstream from the wellheads, where free water is separated from the gas and the gas is dehydrated in preparation for transport on Transco's former facilities. No further physical preparation takes place until the gas reaches shore. The FERC's chosen "central points of aggregation" are nothing more than forks in the road, far from where the gas is first physically prepared for distribution.

The Court of Appeals observes (App. at 3a, 16a) that the FERC *does* consider a number of "physical criteria" in applying its new test, but that is beside the point if the test does not ultimately define the boundary between gathering and transportation at or near a point where the gas is physically prepared for the first stages of distribution.

Furthermore, the Court of Appeals' willingness to accord *Chevron*[7] deference to FERC's "reasonable" application of its new test is incorrect in the light of *Neal v. United States*, 516 U.S. 284, 295 (1996). App. at 7a, 19a. As *Neal* makes clear, federal agencies and lower courts must honor this Court's settled interpretation of a federal statute.[8] Neither the FERC nor the Court of Appeals had discretion to ignore *Northern Natural*'s narrow interpretation of "gathering" in the NGA.

The Court of Appeals erred as well in suggesting (App. at 18a-19a) that Section 5 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1334(f), provides an effective substitute for NGA rate protection. The OCSLA contains no provisions comparable to §§ 4 and 5 of the NGA, 15 USC §§ 717c, 717d, requiring OCS pipelines to charge only "just and reasonable" rates on file with and approved by the FERC, and thus the FERC has frequently recognized that the OCSLA does not provide rate protection equivalent to the NGA's.[9] Moreover, the protections afforded by OCSLA

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[7] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[8] *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-12 (1989); *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1375 (Fed. Cir. 2000).

[9] *See, e.g., Transco (NPI/CT), order on reh'g*, 97 FERC at 62,382; *Transco (NHI/WC), order on reh'g*, 97 FERC at 62,409; *Transco (CL), order on reh'g*, 97 FERC at 62,396; *Trunkline Gas Co.*, 97 FERC

§ 5(f) were expressly intended by Congress *not* to "limit, abridge, or modify" any other provision of federal law with respect to pipelines on the OCS, including the NGA. 43 U.S.C. § 1334(f)(4).

II. THE *SEA ROBIN* RULE IS SUITABLE FOR REVIEW.

Sea Robin still owns the facilities designated by FERC as gathering upstream of Vermilion Block 149, and thus those facilities remain (for the time being) subject to FERC rate regulation under the "in connection with" clauses of NGA §§ 4 and 5. FERC and the other respondents in the *ExxonMobil* case contend, accordingly, that review of the *Sea Robin* orders in *ExxonMobil* would be premature.[10]

No such issue affects the instant case. By approving the transfer of the hundreds of miles of Transco facilities to Williams, FERC's orders below removed such pipelines from its authority under the NGA in an "in connection with" capacity or otherwise.[11] This was the circumstance we foresaw in *ExxonMobil* with respect to the exempt Sea Robin facilities: although subject to the FERC's "in connection

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¶ 61,169 at 61,799 (2001) ("*Trunkline*"); *Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, Order No. 639-A, III FERC Stats. & Regs. ¶ 31,103 at 31,686 (2000), *vacated, Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), *appeal pending, The Williams Cos. v. FERC*, No. 02-5056 (D.C. Cir., filed Feb. 5, 2002) (recognizing that the OCSLA does not provide for rate regulation equivalent to that of the NGA).

[10] FERC Opp. at 9, 15-16, Sea Robin Opp. at ¶ 2, and Williams Opp. at 2, 7 in Nos. 02-1215 and 02-1265.

[11] *See, e.g., Conoco Inc. v. FERC*, 90 F.3d 536, 547 (D.C. Cir. 1996) (upholding FERC's conclusion that "it has no jurisdiction over an affiliate gatherer [which] operates independently of the interstate pipeline and performs only non-jurisdictional activities").

with" authority for the moment, they can be transferred at any time to a non-jurisdictional affiliate and thereby escape all FERC oversight under the NGA, as Transco has. Thus both *ExxonMobil* and this case are suitable for review.[12]

III. THE DECISION BELOW INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW WARRANTING REVIEW.

The FERC's *Sea Robin* and *Transco* orders give offshore pipeline owners every incentive to transfer the bulk of their facilities to non-jurisdictional gathering affiliates who can then charge captive shippers monopoly rents for movement of gas over formerly regulated lines.[13] This result is flatly contrary to *Northern Natural* and to the purpose of the NGA, which, in this Court's own words, is to afford consumers of interstate gas services "a complete, permanent, and effective bond of protection from excessive rates and charges."[14]

The FERC's license of OCS pipelines' exercise of market power can damage the interstate market by inviting reduced exploration and premature abandonment of existing captive production. Barring the intervention of this Court, NGA rate protection will no longer exist on major OCS pipelines,

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[12] Concurrently with the submission of this petition, we have asked by letter to the Clerk that the Court consider this case and the petitions in Nos. 02-1215 and 02-1265 in tandem at the same conference.

[13] Transco is not the only OCS pipeline that, relying on the *Sea Robin* orders, has sought to spin down and reclassify formerly regulated facilities. *See Trunkline*, *supra* note 9; *Enron Gulf Coast Gathering, L.P.*, 97 FERC ¶ 61,001 (2001); *Dauphin Island Gathering Sys.*, 93 FERC ¶ 61,198 (2000).

[14] *Sunray Mid-Continent Oil Co. v. Federal Power Comm'n*, 364 U.S. 137, 147 (1960); *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 388 (1959).

jeopardizing in these times of national gas shortage[15] Congress' intent "to assure an adequate and reliable supply of gas [to the interstate market] at reasonable prices." *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[15] *See Natural Gas Supply and Demand Issues: Hearing Before the House Comm. On Energy and Commerce*, 108th Cong. (June 10, 2003) (statement of Alan Greenspan, Chairman, Federal Reserve Board); *Natural Gas Supply: Hearing Before the Sen. Comm. on Energy and Natural Resources*, 108th Cong. (July 10, 2003) (statement of Alan Greenspan, Chairman, Federal Reserve Board).